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Supreme Court of the United States.

OCTOBER TERM, 1965.

No. 368

A BOOK NAMED "JOHN CLELAND'S MEMOIRS OF A WOMAN OF PLEASURE",
G. P. PUTNAM'S SONS (INTERVENOR), *Appellant*,

v.

ATTORNEY GENERAL OF THE COMMONWEALTH OF MASSACHUSETTS, *Appellee*.

JURISDICTIONAL STATEMENT.

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Supreme Court of the United States.

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No.

A BOOK NAMED "JOHN CLELAND'S MEMOIRS OF A WOMAN OF PLEASURE",
G. P. PUTNAM'S SONS (INTERVENOR), *Appellant*,

v.

ATTORNEY GENERAL OF THE COMMONWEALTH OF MASSACHUSETTS, *Appellee*.

JURISDICTIONAL STATEMENT.

This is an appeal from a judgment of the Supreme Judicial Court of the Commonwealth of Massachusetts entered April 22, 1965, and from a final decree after rescript of the Superior Court of the Commonwealth of Massachusetts entered pursuant thereto. Appellants submit this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial federal constitutional questions are presented.

Opinion Below.

The opinion of the Supreme Judicial Court is reported at 1965 Mass. Adv. Sh. 635. It is set forth at pages 36 to 41 of the Appendix.

Jurisdiction.

The proceeding that gives rise to this appeal was brought pursuant to chapter 272 of the General Laws of Massachusetts, §§ 28C-28H. Invoking these statutory provisions, the Attorney General filed a petition seeking interlocutory and final adjudication that the book entitled "John Cleland's Memoirs of a Woman of Pleasure" published by G. P. Putnam's Sons (hereinafter called "*Memoirs*") is obscene, indecent and impure (R. 1-2). Pursuant to statutory provision, G. P. Putnam's Sons intervened. (The Attorney General will be referred to as "the Attorney General" and the intervening publisher as "the Publisher".) The Publisher interposed defenses based solely on the First Amendment. The Superior Court rejected the Publisher's constitutional contentions, declared the book not entitled to the protection of the First Amendment, and adjudged it obscene (R. 124-125). The Supreme Judicial Court affirmed. Its judgment was entered April 22, 1965, and notice of appeal was filed on June 21, 1965. The appeal is taken from the judgment of the Supreme Judicial Court and from the decree entered thereon by the Superior Court.*

The statutory provision believed to confer jurisdiction of the appeal upon this Court is 28 U.S.C. § 1257(2).

The cases believed to sustain the jurisdiction of this Court are *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U.S. 282; *Roth* v. *United States* and *Alberts* v. *California*, 354 U.S. 476; *Manual Enterprises, Inc.*, v. *Day*, 370 U.S.

*The Supreme Judicial Court is not a court of record, the record in this case being in the Superior Court. Although the judgment of the Supreme Judicial Court is final for purposes of appeal to this Court (*Cole* v. *Violette*, 319 U.S. 581), it is the Massachusetts practice to enter a further final decree upon the rescript of the Supreme Judicial Court, and, to avoid any question, this appeal is taken from both.

478; *Grove Press, Inc.*, v. *Gerstein*, 378 U.S. 577; and *Jacobellis* v. *Ohio*, 378 U.S. 184.

Statutes Involved.

The statutes involved are §§ 28C-28H of chapter 272 of the General Laws of Massachusetts. They are set forth in the Appendix at pages 47 to 49.

Questions Presented.

The basic question on appeal is:

> Whether §§ 28C-28H of chapter 272 of the General Laws of Massachusetts, as applied to the book named "John Cleland's Memoirs of a Woman of Pleasure," are unconstitutional under the First Amendment of the United States Constitution as made applicable to the states by the Fourteenth Amendment of the United States Constitution.

Within the foregoing basic question there are comprised, among others, the following subsidiary questions:

(*a*) Whether the publication of a book is protected by the First Amendment if it is not utterly without social importance within the meaning of *Roth* v. *United States* and *Alberts* v. *California*, 354 U.S. 476, and whether "John Cleland's Memoirs of a Woman of Pleasure" is such a book.

(*b*) Whether the publication of a book is protected by the First Amendment if it does not appeal predominantly to prurient interest within the meaning of *Roth* v. *United States* and *Alberts* v. *California*,

354 U.S. 476, and whether "John Cleland's Memoirs of a Woman of Pleasure" is such a book.

(*c*) Whether the publication of a book is protected by the First Amendment if it is not patently offensive within the meaning of *Manual Enterprises, Inc.*, v. *Day*, 370 U.S. 478, and whether "John Cleland's Memoirs of a Woman of Pleasure" is such a book.

Statement of Case.

1. The Proceedings and the Presentation of the Federal Questions.

Sections 28C-28H establish a proceeding by which it may be adjudicated that a book is obscene, indecent and impure.* The consequence of such an adjudication, under the law of Massachusetts, is the suppression of the book.† The Attorney General's petition sought such an adjudication (R. 2). The Publisher answered by setting up defenses based on the United States Constitution, and made no other defense.

The answer (1) denied that the book is obscene; (2) alleged that the sale and distribution of the book are pro-

*The second and third statutory adjectives will hereinafter be treated as subsumed in the term "obscene". See *Commonwealth* v. *Moniz*, 338 Mass. 442.

† Section 28B of chapter 272 (the section immediately preceding those under which the proceeding was brought) provides imprisonment and fine for "Whoever . . . publishes . . . or distributes . . . a book, knowing it to be obscene . . . ." Section 28H provides that, if a proceeding such as the present one results in an adjudication that the book is obscene, then in any trial under § 28B the defendant "shall be conclusively presumed to have known said book to be obscene." Thus the question whether the book is obscene, as well as the question of scienter, can be litigated only in this proceeding and not in any subsequent criminal prosecution.

tected by the First Amendment of the United States Constitution as applied to the states by the Fourteenth Amendment; (3) alleged that, if the application of the Massachusetts statute results in an adjudication that the book is obscene, the statute as applied is unconstitutional under the First and Fourteenth Amendments; (4) alleged that an adjudication whose effect is to impede or prevent the sale or distribution of the book would be an unconstitutional deprivation of rights guaranteed by the First and Fourteenth Amendments. The Publisher prayed that the court adjudicate the book not obscene, and enter a decree, pursuant to the declaratory judgment statute of Massachusetts (G.L. c. 231A), making a declaration of the points alleged by way of defense (R. 6-8).

The constitutional questions were again presented in the Publisher's trial briefs and orally by the Publisher's counsel at the trial (R. 103-107). It was emphasized that the Publisher's denial of the allegation of obsceneness was based solely on the ground that the book is constitutionally protected expression (R. 103). On appeal to the Supreme Judicial Court the brief for the Publisher posed the issue as follows:

> "The Issue.
>
> "This case involves a single issue: Is the publication of *John Cleland's Memoirs of a Woman of Pleasure* protected by the guaranties of the First Amendment of the United States Constitution?
>
> "The Intervenor concedes that the pertinent Massachusetts statutes have as complete an effect as the First Amendment permits them to have—that the legislation covers all material obscene in the constitutional sense. The Intervenor takes no position as to the proper construction of the statutes apart from the limitations on such construction that are imposed by

the First Amendment. *The Intervenor contends, however, that, if the statutes are construed to penalize the publication of this book or to sanction its suppression, the statutes as so applied are unconstitutional.* [Italics added.]

"The issue of constitutionality tendered by the Intervenor relates solely to the Federal Constitution. It involves the First Amendment as made applicable to state statutes and state action by the Fourteenth Amendment. We believe that the protection afforded by the First Amendment is at least as broad as that afforded by the Constitution of the Commonwealth of Massachusetts, but, if the state constitutional guaranty be thought to be any broader than the federal, the Intervenor waives the additional protection."

The Supreme Judicial Court dealt with the appeal, in accordance with the issue thus presented, as involving only a question under the First Amendment. The majority were "of opinion that Memoirs is not endowed with constitutional protection" (App. p. 40) and ordered the decree affirmed. The rescript of the Supreme Judicial Court incorporated the opinion.

2. The Facts.

At the trial a copy of the book was introduced by stipulation, and the Attorney General called one witness. The Publisher called several witnesses and introduced documentary evidence.

The following witnesses testified to the literary merit, historical importance and other values of the book: Fred Holly Stocking, Professor of English and Chairman of English Department, Williams College; John N. Bullitt,

Professor of English and Master of Quincy House, Harvard College; Robert H. Sproat, Associate Professor of English Literature, Boston University; Norman N. Holland, Associate Professor of English, Massachusetts Institute of Technology; and Ira Konigsberg, Assistant Professor of English and American Literature, Brandeis University. The Attorney General's witness was Dr. John E. Collins, Headmaster of the Newman Preparatory School.

The Publisher's witnesses were all highly qualified (R. 45-46, 59, 69-70, 77, 93). Their qualifications were not equalled by those of the one witness for the Attorney General (R. 20).

The Publisher also introduced documentary evidence. On the matter of literary merit, there are essays by the critics J. Donald Adams, V. S. Pritchett and Brigid Brophy, in *The New York Sunday Times Book Review,* the *New York Review of Books* and the *New Statesman* respectively, and an article in *Time* magazine (R. 31-43). On the matter of community standards, there are newspaper clippings and a copy of *Life* magazine.

The volume in question contains the Cleland novel, an introduction by Peter Quennell and a historical note by the publisher. For over two centuries Cleland's work has had a wide, though for the most part surreptitious, circulation (Ex. A, Introduction and Note). In 1963 it was finally given open publication by G. P. Putnam's Sons, a company that has engaged in a century and a quarter of distinguished publishing (R. 90-91). The distribution of the book in no way departed from the normal course of Putnam's distribution; its only unusual feature was the relatively large number of orders from universities and libraries (R. 91).*

*The Library of Congress requested the right to translate the book into Braille (R. 91).

Memoirs is one of a group of works important in the development of the English novel. A single decade—the 1740's—saw the publication of Richardson's *Pamela* and *Clarissa,* Cleland's *Memoirs* and Fielding's *Tom Jones.* The works of that decade may be said to have developed the English novel in the modern sense, and *Memoirs* is very much part of the process (R. 93-95).

Memoirs is, of course, an erotic novel. It is at the same time a work of art—careful and gifted writing that succeeds as a novel. Read as a whole, it creates an effect that is primarily literary (R. 46, 53-54, 58, 60, 70, 79, 93-94). The style is excellent (R. 46, 79, 96), but the literary merits of the book go considerably beyond the stylistic. It is artistically structured fiction that contains a "plot with a purpose" (R. 47, 61, 65, 70, 80). It is a "novel of education", that is, a novel in which the principal character learns from experience and develops and changes (R. 61). She participates in the experiences that she narrates and then reflects and generalizes upon them (R. 46-47, 49, 50, 73). This reflection results in her acceptance and advocacy of certain values and ideas—the worth of pleasure and the place of pleasure; prudence, moderation and a rational view of the world; and finally an affirmation of the superiority of sex-in-love to the merely lustful (R. 32, 40, 46-47, 61, 65, 70, 71-76, 96, 101). Cleland displays the high literary talent of imaginative projection (R. 47). There is skill in characterization (R. 62-63) and a gift for comedy (R. 61-62). The book shows acute psychological insight (R. 80-81). Apart from its intrinsic merits, the novel has historical value both because of the part it plays in the history of English literature (R. 60, 62, 78, 93-96) and because of the information it gives concerning the period (R. 33, 38-39, 47, 59, 62, 78, 93-94).

The witnesses, as both critics and general readers inevitably do, differed among themselves in their appraisals

of the book. But they all (except Dr. Collins) agreed that *Memoirs* is a work of considerable value.

The Appropriateness of Review.

By the decisions of the courts below, a book is suppressed. The suppression is effected over the contention that the book constitutes expression protected by the First Amendment. "Such an issue . . . must ultimately be decided by this Court." *Jacobellis* v. *Ohio,* 378 U.S. 184, 188. Disposition by this Court is particularly appropriate in the present case.

1. THE CASE PRESENTS A MATTER OF CONSIDERABLE CULTURAL SIGNIFICANCE.

It has, of course, been held that the guaranties of freedom of speech and of the press go beyond vocal utterance and the printed word. It does not follow, however, that the guaranties are to be applied in the same way, or to the same extent, with respect to all forms of expression. See *Freedman* v. *Maryland,* 380 U.S. 51. Books have a certain primacy because of their importance to society. Moreover, such conflicts as there may be with interests sought to be served by anti-obscenity legislation are less intense where books are concerned.

The audience for a book is the individual reader, not an assembled group. In a theatre audience, for example, there is a simultaneously shared experience, and the social interaction itself creates difficulties.* Again, the reader of a book has instant control over his exposure to it; he can terminate the experience by closing the book, and if its repu-

*The familiar hypothetical from another area of restraint—shouting "Fire!" in a theatre—would hardly present a problem if there were only one other person in the theatre.

tation puts him off, he need not open it. In contrast, other means of communication—the sound truck, for example, or the advertising poster in a train or bus—make us their captive. Television, the great new medium of our time, presents both aspects: its communications are received in a social situation, and continued exposure is not always easily terminated. Typically, television-viewing is a family affair, and it takes a family consensus to end it. Finally, media of expression differ in their impact. Scenes described in commonly accepted books would, if performed by actors on a stage, or displayed in photographs on a billboard, become quite different in their effect. There is no means of general communication that is more private, more intellectual and less involved with public decorum than a book.

Hence the possibilities of antagonism between the publishing of books and other interests of society are relatively small. At the same time, books have a singular importance for society. Tradition gives them a special place. It was to liberty of printing that John Milton's *Areopagitica* was addressed, and the great controversies about freedom of expression that were resolved in the adoption of the First Amendment had to do mainly with books (including that predecessor of contemporary paperbacks, the pamphlet).

Books provide a vehicle for the transmission of thought that is not matched by other forms of expression. They communicate ideas not alone by way of exposition, but also through the shared experiences and perceptions of poetry and fiction. Other forms of expression may be as good or better for entertainment, excitement or the arousing of emotion, but the printed word remains our most important medium for the dissemination of ideas.

Although the Court has several times spoken on the subject of the relationship between the First Amendment and anti-obscenity legislation, it has had little occasion to do so

in connection with books. The *Roth* and *Alberts* decisions (354 U.S. 476) did not at all involve the particular material that occasioned the prosecutions. The publications that were considered (by some members of the Court) in *Manual Enterprises, Inc.*, v. *Day*, 370 U.S. 478, and in *A Quantity of Books* v. *Kansas*, 378 U.S. 205, were not of a character to provide helpful analogies for serious writers and reputable publishers. The cases concerning *Ulysses* (72 F. 2d 705, affirming 5 F. Supp. 182) and *Lady Chatterley's Lover* (*Grove Press, Inc.*, v. *Christenberry*, 276 F. 2d 433, affirming 175 F. Supp. 488) were concluded (by judgments in favor of publication) before reaching this Court. The case concerning Edmund Wilson's *Memoirs of Hecate County* was decided (against publication) without opinion, and by an evenly divided Court (*Doubleday & Co., Inc.*, v. *New York*, 335 U.S. 848). *Tropic of Cancer* is the only work as to which the claim of literary value has been made and on which there have been opinions of this Court (*Grove Press, Inc.*, v. *Gerstein*, 378 U.S. 577). Even there the five members of the Court who dealt with the book referred to reasons stated in another case that did not involve a book. Four Justices were of the opinion that certiorari should be denied and did not participate in the consideration of the merits, presumably on the ground that constitutional questions had not been preserved.* These circumstances perhaps account for the fact that there is incomplete understanding of the meaning and effect of the *Tropic* decision.†

*The inference is based on the fact that the petition for certiorari had been opposed on this ground, the respondent arguing that the petitioner had waived the constitutional questions, and that only the Supreme Court of Florida—and not the intermediate appellate court whose judgment was sought to be reviewed—had jurisdiction to hear appeals involving the validity of a statute or construing the United States or Florida Constitutions (respondent's brief in opposition to petition for writ of certiorari, pp. 2-4).

† Public misapprehensions are illustrated in an issue of "Decency Reporter", the publication of the Citizens For Decent Litera-

In view of the importance of books, and the paucity of direct statement on the protection afforded books by the first amendment, what this Court will have to say with respect to *Memoirs* is eagerly awaited as a guide to what may be written and what may be published.

2. THERE IS A MULTIPLICITY OF LITIGATION THAT ITSELF IMPAIRS FIRST AMENDMENT RIGHTS AND THAT CAN BE ENDED BY A DECISION OF THIS COURT.

The basic issue on appeal—whether *Memoirs* may be suppressed—is in litigation or has been litigated in four states: New York, Massachusetts, New Jersey and Illinois. In Illinois a bookseller has been convicted in a criminal prosecution; counsel for the defendant have stated that an appeal is planned. In New Jersey, in an action brought under a New Jersey statute similar to Article 22-a of the New York Code of Criminal Procedure (the statute involved in *Kingsley Books, Inc.*, v. *Brown,* 354 U.S. 436), there has been a decision after trial holding that the book is obscene and not entitled to constitutional protection (*G. P. Putnam's Sons* v. *Calissi,* 86 N.J. Super. 82, 205 A. 2d 913); notice of appeal has been filed, and the appellate court has stayed the matter pending the determination of the instant appeal. In New York, in an action brought under Article 22-a, the trial court has held the book entitled to constitutional protection, the Appellate Division has reversed by a vote of three to two, and the Court of Appeals has reversed the Appellate Division by a vote of four to three (*Larkin* v. *G. P. Putnam's Sons,*

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ture (vol. 2, No. 35, October 29, 1964). It refers to the action of this Court in *Grove Press* v. *Gerstein* as "a 5-4 decision," and criticizes the Illinois Supreme Court for following *Grove Press* v. *Gerstein* and ignoring "the two other cases that the U. S. Supreme Court upheld."

14 N.Y. 2d 399, 200 N.E. 2d 760). In the present case the Supreme Judicial Court also has divided four to three, the publication being suppressed in Massachusetts by the same margin as that by which it was sustained in New York. Thus, of the fourteen high state court judges who have ruled on the book, seven have construed the decisions of this Court to sanction its suppression and seven have construed those decisions to accord the book the protection of the First Amendment. (It may be noted that the Supreme Judicial Court and the Court of Appeals have also rendered four-to-three decisions on *Tropic of Cancer*, the positions being exchanged; the Massachusetts majority found the Miller book entitled to the constitutional protection that the New York majority denied it.)

Multiplicity of litigation is itself a powerful form of extra-judicial censorship. It is extra-judicial because, although it invokes judicial processes, its effectiveness depends not on ultimate judicial decision, but on the financial strain that the litigation puts upon the publisher. A publisher enmeshed in litigation in a number of jurisdictions —either directly or through the indemnities to booksellers that prevail in the book trade—soon finds himself facing legal expenses that make publication of the book unprofitable, and may even jeopardize his economic existence.* The inhibiting effects on publishing, and consequently on intellectual and artistic creativity, are plain. There are indications that this method of censorship has been adopted in some localities as a matter of deliberate policy, even where it is expected that the publication of the book will ultimately be sustained in the courts.†

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*See Lewis, "The Most Recent Troubles of 'Tropic': A Chapter in Censorship", *New York Times Sunday Book Review*, January 21, 1962, p. 4.

†See, for example, *Chicago Daily News*, December 2, 1964, p. 6, cols. 6-8, in reporting on certain pending obscenity prosecutions:

A "chilling effect upon the exercise of First Amendment rights" may come from the threat of prosecution (*Dombrowski* v. *Pfister*, 85 S. Ct. 1116, 1121) or from the imposition of financial burden (*New York Times Co.* v. *Sullivan*, 376 U.S. 254). A multiplicity of litigation against a book has both effects: it imposes an extraordinary financial burden on the publisher, and it simultaneously threatens criminal prosecution to booksellers in every state whose highest court has not yet passed upon the book. Since the protection of the First Amendment is asserted as a defense in all the cases involving *Memoirs*, a decision by this Court can forestall the consequences that would otherwise flow from the mass of litigation. Indeed, only a decision by this Court can assure that the right to publish, if it exists in law, also exists in fact.

The Questions are Substantial.

1. THE TESTS ARE INDEPENDENT.

In *Roth* and *Alberts* this Court formulated two independent tests by which it can be determined whether a book, challenged as obscene, is entitled to the protection of the First Amendment. One has come to be called the "prurient interest" test, the other the "social value" test. In *Manual*

"Assistant State's Atty. Daniel J. Leahy said: 'We're well aware of the decisions lately of the supreme courts. We do not agree with them as a whole or any part of them'."

and *The Hollywood Reporter*, March 24, 1965:

"Rep. Dowdy advocated getting local authorities to prosecute sellers of nudie magazines and other offensive publications and exhibitors of films they believe obscene, even if it is known that under Supreme Court interpretations of law no convictions can be gained. Dowdy said in this way exhibitors and others would simply give up because the receipts would be less than the expense."

Enterprises, Inc., v. *Day*, 370 U.S. 478, a third test, that of "patent offensiveness", was set forth.

The prurient interest test and the patent offensiveness test supply the outer boundaries of the general field to which anti-obscenity legislation relates. But within this general field another test is to be applied: the legislation can have a constitutional application only if the challenged publication is without value. Thus a book found to have intellectual content or artistic merit or some other form of social importance may not be suppressed, regardless of what conclusion might be reached if the prurient interest test were applied by itself and without regard to social value.

It is the Publisher's position that a book must fail by all of these tests before it may be suppressed. If, in applying any one of them, the result is on the side of free expression, suppression is impermissible. The weight of state court authority supported this position even before *Jacobellis* v. *Ohio*, 378 U.S. 184, and *Grove Press, Inc.*, v. *Gerstein*, 378 U.S. 577, were decided. See *Attorney General* v. *Book Named "Tropic of Cancer,"* 345 Mass. 11, 184 N.E. 2d 328; *Zeitlin* v. *Arnebergh*, 59 Cal. 2d 901, 383 P. 2d 152, cert. den. 375 U.S. 957; *McCauley* v. *Tropic of Cancer*, 20 Wis. 2d 134, 121 N.W. 2d 545; but *cf. Haiman* v. *Illinois*, Sup. Ct. of Illinois, 1964, Docket No. 37276 (not reported and withdrawn by order dated July 7, 1964), and *People* v. *Fritch*, 13 N.Y. 2d 119, 192 N.E. 2d 713. After *Jacobellis* and *Grove Press* the high state courts that had earlier rejected the view now accepted it. *City of Chicago* v. *Kimmel*, 31 Ill. 2d 202, 201 N.E. 2d 386; *People* v. *Bruce*, 31 Ill. 2d 459, 202 N.E. 2d 497; *Larkin* v. *G. P. Putnam's Sons*, 14 N.Y. 2d 399, 200 N.E. 2d 760.

In the decision from which the present appeal is taken, the majority, although indicating acceptance of the view (App. p. 40), stated that whether there were three inde-

pendent standards "need not be decided, for in our opinion Memoirs meets all the tests" (App. p. 40).

We submit that the tests are independent. If the proposition is not involved here, it is only because, with all due respect to the majority below, its opinion was wrong at every point; *Memoirs* is a book that under each of the tests must be found to come within the protection of the First Amendment.

2. Memoirs is entitled to constitutional protection under the prurient interest test.

When this Court, in *Roth* and *Alberts,* formulated the prurient interest test, it was not engaged in the simple exercise of synonym-swapping. Most earlier efforts to give meaning to the term "obscene" had ended by doing no more than replacing one epithet with another. "Obscene" was defined as "lewd", "lewd" as "lascivious", "lascivious" as "libidinous", "libidinous" as "licentious" and "licentious" as "lustful". "Immoral", "improper" and "impure" were tried, along with "indecent", "filthy" and "vulgar". The succeeding definitions had different trim, but no functional change, and the troublesome vagueness persisted.

In the last decade, however, courts began to consider the matter in a constitutional context, and in that context this Court, with *Roth* and *Alberts,* dispelled a good deal of the vagueness. The Court chose a word that had not been prominent in earlier formulas—the word "prurient". It was a word whose peculiar connotations set it apart from its predecessors. The choice, of course, was not mere rhetoric. The purpose, we suggest, was to make it clear that the *Hicklin* test and its derivatives were no longer the law, and to define more narrowly and with greater depth

the characteristic that must be found in the material upon which anti-obscenity statutes may operate.

The fact that a publication may appeal to the sexual interest of the reader, or may create a sexual response in him—the fact that the publication may be called erotic, or, in terms of the older definitions, lustful—would not satisfy the new and narrower prurient interest test. The etymological source of "prurient" is a word that means "itching", and its present-day connotations are "dirty", "nasty", "furtive", "unwholesome". In the American Law Institute definitions quoted and approved by the Court, "prurient interest" is "a shameful or morbid interest in nudity, sex, or excretion". This leaves no room for the proposition that a writing may be suppressed merely because it produces normal sexual response in a healthy adult. The A.L.I. Comment contains the following statement:

> ". . . we reject the prevailing tests of tendency to arouse lustful thoughts or desires because it is unrealistically broad for a society that plainly tolerates a great deal of erotic interest in literature, advertising and art, and because regulation of thought or desire, unconnected with overt misbehavior, raises the most acute constitutional as well as practical difficulties." (A.L.I. Model Penal Code, Tentative Draft No. 6, p. 10.)

Memoirs, of course, is literature that has "a great deal of erotic interest". It is a book about sex. But the interest of its heroine in sex is not morbid or shameful, nor is the interest of the normal adult reader. We respectfully refer the Court to portions of the record which have particular bearing on this point (R. 29-30, 33-34, 35-36, 37-38, 41-43, 101). The heroine-narrator's attitude toward sex is open

and essentially innocent, not leering or dirty. Her appreciation of sex is natural, not sick or perverted. Aberration is rejected and denounced. The book is directed toward life, not toward morbidity. The statement of the prevailing opinion of the Court of Appeals of Ontario, in holding *Memoirs* not obscene, is pertinent:

> "In my opinion, the book, read as a whole, has not about it that aura of morbidity nor that degree of suggestive pruriency which might render it obscene within the meaning of the Code." (*Queen* v. *S. Coles Co. Ltd.*, 44 Crim. Rep. 219.)

Any legislative attempt to do away with books that may excite sexual thoughts and desires becomes ludicrous when viewed against the realities of contemporary civilization. An eighteenth-century novel, no matter how much it may be devoted to the act of sex, can hardly add anything to the constant sexual prodding with which our environment assails us. Apart from the evidence offered, the Court can take judicial notice of the fact that our advertising, our motion pictures, our television and our journalism are in large measure calculated to produce sexual thoughts and reactions. We live in a sea of sexual provocation.

These aspects of our society may indeed be deplorable, but they are part of the contemporary culture within which, as this Court has held, cases like the present one must be judged. Surrounded as we are by strong and manifold stimulants to our sexual instincts, we cannot bring the force of law to bear upon the publication of a book on the ground that its effect on a reader may be that of "arousing him to libidinousness."

Nor do the references, in the prurient interest formula, to "the average person" and to "contemporary community standards" imply a broader brush of condemnation.

The theme of the portion of the *Roth* and *Alberts* opinion in which the prurient interest test is stated is the final rejection of the *Hicklin* rule (354 U.S. 476, at 488-489). *Hicklin* had notorious weaknesses: (*a*) it stressed isolated excerpts of the book in question; (*b*) it judged those excerpts by their effect on the particularly susceptible, and (*c*) it looked to fixed concepts of propriety, regardless of time, place and circumstances. The courts that refused to follow *Hicklin,* as the *Roth* and *Alberts* opinion says, (*a*) considered the book as a whole, (*b*) judged it according to its effect upon the normal healthy adult rather than upon the particularly susceptible, and (*c*) stressed current mores and reading habits as distinguished from the notions of propriety entertained by British judges of the mid-nineteenth century. This Court's use of the term "average person" was designed to remedy the second weakness of the *Hicklin* rule, and the use of the term "contemporary community standards" was designed to remedy the third.

The Court's repudiation of the *Hicklin* doctrine did not permit its replacement with a rule by which an "average" notion of what is objectionable should control the freedom to write and be read. Such a rule would forbid dissent in matters of taste, and would impose a tyranny no less repugnant to the constitutional guaranties than that imposed by *Hicklin.* It would be a direct contradiction of the Court's declaration that "All ideas . . . even ideas hateful to the prevailing climate of opinion—have the full protection of the guaranties . . ." (354 U.S. 476, 484).

The negation of the *Hicklin* test expressed in the phrases "average person" and "contemporary community standards" does not mean that the rights guaranteed by the First Amendment are to be determined by conducting a Gallup poll among the population at large. Where a statute purports to control general publication, the reference to "the average person" excludes as criteria the possible

responses and attitudes of special elements of the population. (A less intrusive statute, which might, for example, regulate sales to children, is to be distinguished from a statute that suppresses publication altogether.) The reference to "contemporary community standards" fixes attention on the historic fact that standards change. The phrases were meant, we submit, to make clear that it is today's normal adult reader who is to be kept in mind; they were not meant to limit writers and publishers to an average notion of what ought to be published, or to limit a minority of readers to what a majority might think good for them. The Court was not seeking to chain creative minds to the dead center of convention at a given moment in time.

The newspaper clippings and the magazines that are in evidence deal with the Profumo affair. They are illustrative of the contemporary community standards and the customary limits of candor that form the frame of reference for the application of the prurient interest test. They demonstrate the broad range of public tolerance toward reading materials. Newspapers and magazines, at about the time of the publication of the book in question, put before the public material remarkably similar to what is objected to in the book. Readers saw daily descriptions of prostitution, orgies, lesbianism, voyeurism, flagellation and other sexual excesses. It can hardly be maintained that what may be presented as present-day fact to the entire public may not be presented as two-hundred-year-old fiction to the book-buying portion of the public.

The entire discussion in the opinion of the majority below as to how it arrived at the conclusion that *Memoirs* fails the prurient interest test is as follows:

> "We have no doubt that the dominant theme of Memoirs appeals to prurient interest. The book is

> composed almost entirely of a series of episodes involving Lesbianism, voyeurism, prostitution, flagellation, sexual orgies, masturbation, fellatio, homosexuality, and defloration, all of which 'goes substantially beyond customary limits of candor in describing or representing such matters.' " (App. p. 38.)

From the catalog of episodes one may perhaps infer that it is the presence of aberrations that influenced the court.* We submit that the itemization does not constitute an accurate description of the book. The principal sexual interest of *Memoirs* is a normal heterosexual interest, and, as a number of the witnesses pointed out, Fanny Hill extols the normal sexual relationship and scorns the deviant. In any event, however, it is fundamental that no subject matter as such is excluded from the First Amendment guaranties. As to the way in which the subject matter is presented, we submit that *Memoirs* does not go "substantially beyond customary limits of candor", as those limits have been fixed by contemporary literature that is reputably published and publicly accepted.

Possibly the crucial words are "almost entirely". They suggest that the majority below based its conclusion on the amount of sexual material in *Memoirs*. But surely the extent to which a book deals with sex cannot determine the application of the test. If a book does not have that quality of essential nastiness and morbidity which identifies appeal to prurient interest, the quantity of sexual material in the book will not create it. Prurience is not a matter of arithmetic.

Earlier in its opinion, the majority states: "The fact that *Memoirs* may arouse sexual thoughts and desires is

*It may be noted that the court's list is very similar to the summary above of the items contained in the Profumo newspaper reports.

not, in itself, sufficient to deprive it of its constitutional protection'' (App. p. 37). The statement is unexceptionable, but the opinion does not otherwise make a case for condemnation under the prurient interest test. With all the respect due a distinguished court, it would seem that, despite the disclaimer, the majority found *Memoirs* prurient because it found *Memoirs* erotic. But whatever the reasoning behind the majority's elliptical statement, the conclusion it reached necessarily involves a departure from the prurient interest standards as they were set forth in *Roth* and applied in the subsequent *per curiam* decisions of this Court.

3. Memoirs is entitled to constitutional protection under the patent offensiveness test.

The term ''patent offensiveness'' is given definition by the facts of the case in which it first appeared. Apart from the effect of the *Manual Enterprises* publications upon those ''unfortunate persons whose patronage they were aimed at capturing'' (370 U.S. 478, 490), it is apparent from the descriptions of the publications (370 U.S. 478, 489-490, 526-527) that most adults would, as the Court did, recognize them for what they are. ''Patent offensiveness'', then, necessarily means something quite beyond a violation of standards of propriety or good taste. Not everything that the average person finds offensive can be called ''patently offensive'' within the meaning of *Manual Enterprises*. But, even if we were considering standards of taste rather than standards of constitutional law, Fanny Hill would do well:

> ''. . . she never utters an obscene word, rarely descends even to colloquialism, never to the clinical; she

indeed writes an elaborate literary language that would do credit to any master of baroque and poetic utterance—shall we say Henry James?—spoken in a drawing room. And it is not shabby baroque." (Pritchett, R. 32.)

"Mercifully *not* 'robust', or Rowlandsonian, [Cleland] is decorous not merely in vocabulary but down to the last cadence of his fine, plain prose." (Brophy, R. 40-41.)

". . . in an age when even serious authors treat the sexual act in terms of a case history or social protest (and the Olympia Press's professional pornographers are driven to exploit De Sadean whips, chains and intricate multiple interlacings to keep ahead of the uncensored press), Fanny Hill's straightforward heterosexuality must come as a shock. None of her escapades, for instance, are as unsavory as the AC-DC boy-meets-boy encounters of James Baldwin's 'Another Country', nor are they as grubbily explicit as the climactic sexual passage in Updike's 'Rabbit Run.'

"Certainly Fanny was no common harlot. Her 'Memoirs' combine literary grace with a disarming enthusiasm for an activity which is, after all, only human. What is more, she never uses a dirty word." (*Time,* R. 43.)

"Cleland was not a great writer, but he was a gifted one, and in my belief as much entitled to call himself an artist as Henry Miller. The chief difference between them is that Cleland presented normal sexual relations for what they are—the intensest pleasure man derives from his senses; Miller makes them revolting. I would prefer to have a child of mine read Cleland than Miller." (Adams, R. 29.)

"Patent offensiveness" may perhaps be found in a work such as *Tropic of Cancer,* a work entitled to protection for other reasons. But the term cannot appropriately be applied to *Memoirs.* Certainly erotic in subject matter, it is just as certainly, in its patent qualities, free from the extreme offensiveness that *Manual Enterprises* contemplates.

With respect to this test, the majority below, referring to the sentence supporting its conclusion on prurient interest, said only:

> "For the same reason, we hold Memoirs to be such an affront to current community standards as to constitute 'patent offensiveness.' "

This would make patent offensiveness turn on subject matter rather than on patent characteristics, and negate the point of *Manual Enterprises* that the question of patent offensiveness is not the same as the question of appeal to prurient interest.

4. Memoirs is entitled to constitutional protection under the social value test.

Although the formulation of the prurient interest test attracted a great deal of attention, the *Roth* and *Alberts* opinion contained another, more fundamental, limitation on anti-obscenity legislation. The statute in each case was attacked as unconstitutional *in toto* and there was no other issue. The majority accordingly undertook a comprehensive statement of the reasons why the First Amendment does not protect obscene material, and this necessarily entailed a description of just what this unprotected material is.

The majority held that it has two characteristics. One is its appeal to prurient interest, discussed above. The

other is its utter worthlessness. It is not every worthless publication, of course, that the statutes can affect; it must be a publication that appeals predominantly to prurient interest. Nor is it every publication considered prurient that the statutes can affect; it must be a publication "utterly without redeeming social importance." For unless the publication is worthless trash, it is not possible to justify its suppression in the face of a Constitution that forbids abridgement of freedom of the press.

Laws affecting speech or writing have, of course, been held to have a valid operation in spite of the First Amendment guaranties. The *Roth* majority referred to cases that had so held. The cited cases involved situations in which the speech or writing amounted to conduct rather than expression, or was so entwined with conduct that the behavioral rather than the expressive aspect dominated.* Prohibitory laws might also operate where material is so utterly devoid of value that it need not be regarded as speech or writing at all. This last category provided both

*_United States_ v. _Harriss_, 347 U.S. 612 (disclosure provisions of the Federal Lobbying Act); _Breard_ v. _Alexandria_, 341 U.S. 622 (municipal ordinance prohibiting peddlers from calling upon private residences without invitation); _Teamsters Union_ v. _Hanke_, 339 U.S. 470 (state court injunction against picketing); _Kovacs_ v. _Cooper_, 336 U.S. 77 (municipal ordinance against sound trucks emitting "loud and raucous noises"); _Prince_ v. _Massachusetts_, 321 U.S. 158 (state statute prohibiting newspaper sale on the streets by minors); _Labor Board_ v. _Virginia Electric & Power Co._, 314 U.S. 469 (coercion by employer under National Labor Relations Act; ". . . conduct, though evidenced in part by speech, may amount, in connection with other circumstances, to coercion within the meaning of the Act" (p. 477)); _Cox_ v. _New Hampshire_, 312 U.S. 569 (state statute requiring a license for parade); _Schenck_ v. _United States_, 249 U.S. 47 (the "clear and present danger" test applied to a conspiracy to circulate materials influencing persons to obstruct a wartime draft). 354 U.S. 476, 484.

the constitutional justification for anti-obscenity legislation and, within the area bounded by the prurient interest standards, the constitutional definition of obscenity. Anti-obscenity statutes, the majority held, have a discernible, though severely limited, validity. Legislatures, in the pursuit of goals relating to prevailing concepts of immorality or offensiveness, may ordain suppression despite the strong language in which the First Amendment is cast. But they may do this only with publications that have no social value, and only because they have no social value.

The First Amendment, of course, has its principal function where the majority disapproves. Where a work of any value is in issue, the fact that most of the citizenry views it as immoral or offensive cannot justify a forcible silencing. On the other hand, it may be said of material utterly without value that it does not rise to the level of writing—that is, "the press"—within the meaning of the Constitution. Nothing is lost. Once obscenity is defined as that which has no value, then—and only then—room can be found in our constitutional structure for anti-obscenity legislation. The mark of suppressible obscenity inheres in the constitutional justification of the suppressive legislation.

The social value test supplied not only doctrinal validity but practical workability. The prurient interest test was itself a significant step toward clarity. The elimination of the spectacular weaknesses of *Hicklin* represented an important gain, and the word "prurient" provided some content and character where earlier formulas provided only amorphous emotional connotations. But the prurient interest test, standing alone, left the law to deal with these grave yet delicate questions in terms of judicial reactions that must remain largely subjective.

In determining whether a book is prurient or patently offensive, the court has no evidence apart from the book itself. Judgment is merely a matter of direct and personal reaction. There is the challenged book, and the key word, and the court must decide whether they match or do not match; there is nothing in between. This is not the kind of work for which the process of trial is designed. Indeed, the traditional concept of trial becomes superfluous.

The social value test, on the other hand, adds a criterion that can be objectively applied, and by a process familiar to the law. Judges and jurors are no longer committed to a total reliance on their individual responses. Traditional judicial techniques come into play. There is evidence to be considered.

We are now on familiar judicial ground. Questions of value have long been handled by the courts, and there are time-tested methods at hand. Value is shown by what has taken place outside the court, and, at the trial itself, by the testimony of those who may be qualified as expert in the field.

Real estate experts, for example, give testimony in condemnation cases and in tax cases, and security analysts estimate earning power in corporate reorganization cases. Similarly, those who are qualified to speak about the particular values alleged to reside in a book can offer the court expert testimony on the point. There are among us individuals who, by reason of training and experience, are better qualified than most to appraise the literary or artistic or other merit of a book. Their opinion testimony provides the material of decision. Opinion as to value is not, of course, opinion as to whether a book is prurient or not prurient, or obscene or not obscene; these words signal conclusions of law, which are the business of the court, not of the witness. The function of the witness is to supply data upon which the court may determine whether the book

has that value which brings it within the protection of the First Amendment.

Another source of objective evidence is documentary. Where there are book reviews, or critical essays, additional data can be presented to the court. The situation is analogous to appraisals made, apart from the litigation, where economic value is in issue. Material "utterly without social importance" does not become the subject of critical comment. There naturally will be differences of opinion about any given book, but the fact that there is serious discussion of the work, by recognized critics and scholars, published in established periodicals, is an objective fact of the utmost significance.

That the presence of value in a book, thus proved, entitles it to the protection of the First Amendment has been the law, we submit, since the date of *Roth* and *Alberts*. Most high state courts that considered the matter agreed, even before *Grove Press* and *Jacobellis,* and those cases confirmed the proposition.*

In the present case there are both kinds of evidence. Respected critics have written about the book, and what they wrote is part of the record. In addition, there appeared in court, to face whatever rigors cross-examination might produce, distinguished faculty members from the colleges and universities of the Commonwealth of Massachusetts. Some assign the book a high place in the echelons of literature. Thus Pritchett feels that Cleland succeeded where D. H. Lawrence failed (R. 34-35). Holland ranks *Memoirs,* among eighteenth-century novels, above Defoe's celebrated *Moll Flanders* (R. 79). Others do not rate the book so highly. But all of the witnesses and all of the documentary evidence agree upon the fundamental point: *Memoirs* is a work of literature that has considerable

*See cases cited on page 15, above.

value.* We respectfully refer the Court to the passages that are cited in our Statement of Facts above.†

The majority below gave the social value test only grudging recognition, referring to it as "one other possible test" (App. p. 39). It then formulated the test in a way which, we submit, negates the decisions of this Court. The opinion below states that the test does not require that a book "must be unqualifiedly worthless before it can be deemed obscene" (App. p. 40). The statement cannot be reconciled with this Court's statement that the obscene, in the constitutional sense, is only that which is "utterly without redeeming social importance". There is no discernible distinction between the concept of material that utterly lacks worth and the concept of material that is unqualifiedly worthless.

The majority below not only contradicted this Court's announcement of the applicable principle; it also erred on

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*Even opposing counsel were impressed with the values of the book. The Attorney General's brief to the Supreme Judicial Court stated (at pages 6 and 7) that the writing in *Memoirs* is "quite clever"; that there is "frequent use of highly colorful metaphor"; that there is no reason to disagree with the expert testimony to the effect that "the writing style is artistic"; and, in a sentence instinct with admiration, that there is "a comic flair to the writing that is inescapable". Contrast the statement of Chief Judge Desmond of the New York Court of Appeals on *Tropic of Cancer*. ". . . Not only is there in it no word or suggestion of the romantic, sentimental, poetic or spiritual aspects of the sex relation, but it is not even bawdy sex or comic sex or sex described with vulgar good humor. . . ." (*People* v. *Fritch*, 13 N.Y. 2d 119, at 126.)

†The Attorney General produced one witness in opposition. His opinions were not so much literary evaluations as legal conclusions; his concepts, moreover, differed from those of the courts (R. 23). His misuse of language (R. 20, 22) indicated that he did not approach the subject with a great deal of detachment. Finally, he could not recall important aspects and events of the book about which he was testifying (R. 25).

the constitutional fact of the value to be found in *Memoirs*, ascribing to the book only "some minimal literary value" (App. p. 40). A publication might have considerably less value than the testimony and the documentary evidence show *Memoirs* to have and still rise above the level of "minimal literary value".

The opinion below mentions, in slighting, advocates' terms, that the book "contains a moral" (App. p. 40). But the critics treated Fanny's thoughts about life and love as seriously meant, and entitled to serious reading. Brophy puts it this way: "She is unrepentant in pleasure or lust; but she truthfully perceives—and that, I believe, without the sort of hypocrisy that greater writers like Defoe or Richardson insinuated—that she had physical pleasure in lust but physical, spiritual pleasure in love" (R. 32). Similarly, Pritchett finds Fanny's final statement to be "without, as she rightly claims, hypocrisy. . . ." (R. 40). The witnesses gave more detailed testimony to the same general effect—that the observations, ideas and moral conclusions of the book are thoughtful, substantial and perceptive. (See, for examples, pages 46-47, 61, 70, 73, 96 and 101 of the Record.)

Referring to the expert testimony, the majority said, in passing "much of [it] was strained" (App. p. 40). We respectfully but emphatically disagree. The testimony was careful and specific. The witnesses were not indulging in flights of critical fancy. What they had to say made sense on direct examination, and continued to make sense under persistent cross-examination. The witnesses are individuals of high academic standing, who would be most unlikely to jeopardize that standing by giving sworn testimony that might return to embarrass them. It is one thing to assert that a book is "not obscene" or "not pornographic". These are conclusory statements that can al-

ways be defended on semantic grounds. It is quite another thing for a professional critic or teacher to analyze a book, to give detailed testimony about what values he sees in it, and to appraise the book as against other works of literature. Even if a single individual might conceivably be so irrational as to do what the majority below suggests, it is not conceivable that the entire roster of these distinguished men should be willing to give disingenuous, distorted or otherwise "strained" testimony.*

*Although it is not part of this record, we invite the Court's attention to matters of record in other cases involving this book. The Publisher defended *Memoirs* at three trials. Only three of the witnesses (including the Publisher's president) appeared at more than one of the trials. It was not a matter of finding a few people who would be willing to speak in defense. A large number of highly reputable critics and scholars regarded the book as one that had considerable merit, and they were willing to say so, under oath, in court. The following testified in the New York and New Jersey trials: J. Donald Adams, for many years editor-in-chief of *The New York Times Sunday Book Review;* Eric Bentley, critic, dramatist and Professor of Dramatic Literature at Columbia; Louis Untermeyer, poet, critic and anthologist; Eliot Fremont-Smith, book review editor and regular critic for *The New York Times;* Clarence Decker, Professor of Literature and Vice-President at Fairleigh Dickinson; John McCormick, Chairman of the Department of Comparative Literature at Rutgers; John Hollander, poet and Assistant Professor of English at Yale; Gerald Willen, Assistant Professor of English at Hunter College; Paul Fussell, Associate Professor of English and Director of English Graduate Studies at Rutgers; and David Burrows, Assistant Professor of English at Douglas College For Women.

In the one case that involved a motion for preliminary injunction, the following submitted affidavits or letters attesting the merit of the work: the well-known critics Alfred Kazin, Maxwell Geismar, Dwight MacDonald and Edward B. Garside, together with John Gassner, Sterling Professor at Yale, Barbara Epstein, co-editor of *The New York Review of Books,* and Norman Podhoretz, editor-in-chief of *Commentary* magazine.

It thus appears that in each locality where the book was called into question there was an ample number of highly qualified people

Moreover, there was corroboration for what the witnesses said in the published essays of Pritchett, Adams and Brophy, and in the introduction by Peter Quennell. Celebrated critics thus submitted to the judgment of the literary world opinions very similar to those which the witnesses submitted to the judgment of the court. In neither case is it realistic to suppose that the opinion was less than the best that the writer or the witness had to offer.

5. THE HARD-CORE PORNOGRAPHY TEST LEADS TO THE SAME RESULT.

If "hard-core pornography" is taken as the definition of what may be constitutionally suppressed under anti-obscenity legislation, the result in the present case is the same. Analytically, the concept appears to involve all three standards discussed above. That is, it would seem to be a combination of morbidity, extreme offensiveness and utter worthlessness that denotes hard-core pornography; no such syndrome can be attributed to *Memoirs*. If the concept is considered not analytically but empirically, there is a striking contrast between *Memoirs* and publications that have been held to be obscene: see *People* v. *Finkelstein*, 11 N.Y. 2d 300, 183 N.E. 2d 661, cert. den. 371 U.S. 863; *Burke* v. *Kingsley Books, Inc.*, 208 Misc. 150, 142 N.Y.S. 2d 735, affd. (on another issue) *sub nom. Kingsley Books, Inc.*, v. *Brown*, 354 U.S. 436; *People* v. *Sikora*, 32 Ill. 2d 260, 204 N.E. 2d 768. And comparison with publications that have been deemed not obscene appears to exclude the possibility that

ready to testify that *Memoirs* has substantial value. (Not all who were willing to testify were used as witnesses.) If they represented a negligible minority of critical opinion, it is strange that no member of the hypothetical majority (with the dubious exception of Dr. Collins) would have appeared to give contrary testimony at any of the three trials.

Memoirs might be deemed hard-core pornography; we refer to the various materials in the *per curiam* reversals that followed *Roth,* to the magazine in *People* v. *Richmond County News, Inc.,* 9 N.Y. 2d 578, 175 N.E. 2d 681 (see the description of the magazine at 9 N.Y. 2d 578, 594), to the rough and shocking *Tropic of Cancer* of *Grove Press, Inc.,* v. *Gerstein,* 378 U.S. 577, and to the tailored vulgarities of *A Quantity of Books* v. *Kansas,* 378 U.S. 205.

Conclusion.

This appeal poses, in a case where review by the Court is particularly appropriate, pressing questions with respect to what may be written and published, questions that involve the meaning of earlier decisions of the Court. We have suggested answers to those questions, but it is evident that there is substantial disagreement both among courts below and within courts below. The resolution of the issues growing out of the suppression of *Memoirs* will, we submit, do much to clarify an important and troubled field of constitutional law.

Respectfully submitted,

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Appendix.

Judgment-Rescript.

Commonwealth of Massachusetts.
Supreme Judicial Court for the Commonwealth,
At Boston,

April 22 1965.

In the case of

Attorney General

vs.

A Book Named "John Cleland's Memoirs of a Woman of Pleasure." pending in the Superior Court for the County of Suffolk

Ordered, that the following entry be made in the docket; viz.,—Decree affirmed.

By the Court,

/s/ RICHARD A. McLAUGHLIN, Clerk.

April 22, 1965.

A true copy,
Attest:

RICHARD A. McLAUGHLIN
Clerk of the Supreme Judicial
Court for the Commonwealth

May 24, 1965.

BRIEF STATEMENT OF THE GROUNDS AND REASONS OF THE DECISION:

See opinion on file.

COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss. Superior Court
No. 82126 Eq.

EDWARD W. BROOKE,
Attorney General
v.
A BOOK NAMED, "JOHN CLELAND'S MEMOIRS OF A WOMAN OF PLEASURE", (COMMONLY KNOWN AS FANNY HILL)

FINAL DECREE AFTER RESCRIPT

This cause came on at this sitting after rescript from the Supreme Judicial Court and, pursuant to said rescript, it is ORDERED, ADJUDGED and DECREED that the book named "John Cleland's Memoirs of a Woman of Pleasure", commonly known as "Fanny Hill", is obscene, indecent and impure under the provisions of G. L. c. 272, §§ 28C, 28E and 28F, as amended by St. 1945, c. 278.

And it is further ORDERED, ADJUDGED, DECLARED and DECREED that the above-named book is not entitled to the protection of the First and Fourteenth Amendments to the Constitution of the United States against action by the Attorney General or other law enforcement officer pursuant to the provisions of G. L. c. 272, § 28B, or otherwise.

By the Court, (Kalus, J.)
THOMAS F. BROPHEY
Asst. Clerk

Entered June 10, 1965

ATTORNEY GENERAL *vs.* A BOOK NAMED "JOHN CLELAND'S MEMOIRS OF A WOMAN OF PLEASURE."

Suffolk. January 8, 1965.—April 22, 1965.

Present: WILKINS, C.J., SPALDING, WHITTEMORE, CUTTER, KIRK, SPIEGEL, & REARDON, JJ.

Obscenity, Indecency or Impurity. Book. Constitutional Law, Freedom of speech, Freedom of the press.

Suit in equity heard in the Superior Court by *Macaulay*, J.

SPALDING, J. This is an appeal from a final decree holding the book, "John Cleland's Memoirs of a Woman of Pleasure" (Memoirs), more commonly known as "Fanny Hill," obscene, indecent and impure under G. L. c. 272, §§ 28C, 28E, and 28F (inserted by St. 1945, c. 278, § 1).[1] The petition was brought by the Attorney General. The publisher of the book, G. P. Putnam's Sons, intervened as a party. No jury trial having been claimed under § 28D, the case was heard by a judge. The evidence consisted of the book, various newspaper articles, book reviews and the testimony of several experts in the field of literature. The

[1] Section 28C reads, in relevant part, "Whenever there is reasonable cause to believe that a book which is being imported, sold, loaned or distributed . . . is obscene, indecent or impure, the attorney general . . . shall bring an information or petition in equity . . . directed against said book by name." Then follows a provision relating to a "reasonable cause" hearing, notice to interested persons, and an interlocutory adjudication. Section 28E provides for an adjudication against the book, in the event of default, "if the court finds that the book is obscene, indecent or impure . . . ." Section 28F provides for a contested hearing. "At such hearing the court may receive the testimony of experts and may receive evidence as to the literary, cultural or educational character of said book and as to the manner and form of its publication, advertisement, and distribution."

judge made careful and complete findings of fact and discussed the relevant law exhaustively.

Memoirs was written in England in 1749. For over two centuries it has had for the most part a surreptitious circulation. Memoirs has, for example, previously been a source of litigation in this Commonwealth (see *Commonwealth* v. *Holmes,* 17 Mass. 336), and very recently it has been the subject of decisions by other courts. See *Larkin* v. *G. P. Putnam's Sons,* 14 N. Y. 2d 399; *G. P. Putnam's Sons* v. *Calissi,* 86 N. J. Super. 82.

The sole question is whether the publication of Memoirs is protected by the First Amendment to the United States Constitution, as made applicable to the States by the Fourteenth Amendment. Since a majority of the court held in *Roth* v. *United States,* 354 U. S. 476, 485, "that obscenity is not within the area of constitutionally protected speech or press," the question becomes one of determining whether or not Memoirs is obscene.

The book takes the form of two letters written by a prostitute in which she recounts her life since she, a country girl, was abandoned in London. It concentrates on her sexual experiences, both normal and abnormal, which are described in minute detail. Memoirs, as is conceded by the intervener, is erotic. Erotica and obscenity, however, are not synonymous. The fact that Memoirs may arouse sexual thoughts and desires is not, in itself, sufficient to deprive it of its constitutional protection. If the contrary were the case, the public could be deprived of many of the world's greatest literary and artistic works. Our task, then, is to trace, as best we can, the "dim and uncertain line" which separates obscenity from that which is protected by the First Amendment. See *Bantam Books, Inc.* v. *Sullivan,* 372 U. S. 58, 66; *Jacobellis* v. *Ohio,* 378 U. S. 184, 187. We are under no illusions as to the difficulties involved in "facing up to the tough individual problems of

constitutional judgment involved in every obscenity case." *Roth* v. *United States,* 354 U. S. 476, 498.

The first Supreme Court case to face the obscenity issue squarely was *Roth* v. *United States,* 354 U. S. 476.[1] The majority opinion in that case established the following test: "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest." *Id.* at 489. In a footnote the majority clarified what their notion of "prurient" was by quoting with approval Am. Law. Inst., Model Penal Code, § 207.10 (2) (Tent. draft, No. 6, 1957) which defined that term as ". . . a shameful or morbid interest in nudity, sex, or excretion."[2] *Roth* v. *United States, supra,* at 487, n. 20.

We have no doubt that the dominant theme of Memoirs appeals to prurient interest. The book is composed almost entirely of a series of episodes involving Lesbianism, voyeurism, prostitution, flagellation, sexual orgies, masturbation, fellatio, homosexuality, and defloration, all of which "goes substantially beyond customary limits of candor in describing or representing such matters." Am. Law. Inst., Model Penal Code, § 251.4 (1) (Proposed Official Draft, May 4, 1962). See *Jacobellis* v. *Ohio,* 378 U. S. 184, 191. For the same reason, we hold Memoirs to be such an affront to current community standards as to constitute "patent offensiveness." See *Manual Enterprises, Inc.* v. *Day,* 370 U. S. 478, 482. We would reach this result whether we ap-

[1] This case, as well as all but the most recent authority, is fully discussed in *Attorney Gen.* v. *"Tropic of Cancer,"* 345 Mass. 11. We need not, therefore, elaborate upon the general development of this area of the law.

[2] The same definition of "prurient" has been adopted by Am. Law. Inst., Model Penal Code, § 251.4 (1) (Proposed Official Draft, May 4, 1962).

plied local community or national standards. See *Jacobellis* v. *Ohio, supra,* at 193 (opinion of Brennan, J.), which indicates national standards should be used. But see dissent of Warren, C.J., in that case at page 200, which takes the position that obscenity is to be defined by local community standards.

There is one other possible test which must be considered. The majority opinion in the *Roth* case went on to say that "implicit in the history of the First Amendment is the rejection of obscenity as *utterly without redeeming social importance*" (emphasis supplied) *Id.* at p. 484. While it does not clearly emerge from the opinion whether "social importance" is an independent standard, subsequent decisions shed some light on the matter.

In *Jacobellis* v. *Ohio, supra,* 191 (opinion of Brennan, J., concurred in by Goldberg, J.), the view was expressed that the constitutional status of material cannot "be made to turn on a 'weighing' of its social importance against its prurient appeal, for a work cannot be proscribed unless it is 'utterly' without social importance." See *Tralins* v. *Gerstein,* 378 U. S. 576 (per curiam), and *Grove Press, Inc.* v. *Gerstein,* 378 U. S. 577 (per curiam). Thus it would appear that unless a work is "utterly without social importance" it cannot be deemed obscene. For views which would extend the constitutional protection even further see *Roth* v. *United States,* 354 U. S. 476, 508 (dissent of Douglas, J.); *Jacobellis* v. *Ohio,* 378 U. S. 184, 196 (opinion of Black, J.); *A Quantity of Books* v. *Kansas,* 378 U. S. 205, 213 (opinion of Black, J.).

The trial judge, after an exhaustive and able discussion of the relevant decisions, ruled that the Attorney General, to maintain his petition, must meet the following three tests: "*First,* the 'prurient interest' test, which, because of the holding in the '*Tropic of Cancer*' (345 Mass. 11) case must be shown to be 'hard core pornography'; *Second,* the

'patent offensiveness' test; and *Third,* the 'social value' test." He further ruled that the "[f]ailure . . . to sustain the standards that any one of these tests is designed for will result in an adjudication that the book . . . [is not] obscene in a constitutional sense." Whether the Supreme Court of the United States has laid down three independent standards, all of which (as the judge ruled), must be satisfied, need not be decided, for in our opinion Memoirs meets all the tests.[1] As indicated above, we have little doubt that Memoirs' dominant theme appeals to prurient interests and that it is patently offensive.

It remains to consider whether the book can be said to be "utterly without social importance." We are mindful that there was expert testimony, much of which was strained, to the effect that Memoirs is a structural novel with literary merit; that the book displays a skill in characterization and a gift for comedy; that it plays a part in the history of the development of the English novel; and that it contains a moral, namely, that sex with love is superior to sex in a brothel. But the fact that the testimony may indicate this book has some minimal literary value does not mean it is of any social importance. We do not interpret the "social importance" test as requiring that a book which appeals to prurient interest and is patently offensive must be unqualifiedly worthless before it can be deemed obscene. Upon a consideration of all the evidence, including the book, we are of opinion that Memoirs is not endowed with constitutional protection.

We have not overlooked the fact that Memoirs was recently held not to be obscene in the constitutional sense by

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[1] A fourth criterion, which involves determining whether material is hard core pornography, has been suggested. See *Jacobellis* v. *Ohio, supra,* pp. 184, 197 (opinion of Stewart, J.); *Attorney Gen.* v. *"Tropic of Cancer,"* 345 Mass. 11, 19. But the Supreme Court has never so held.

a closely divided court in *Larkin* v. *G. P. Putnam's Sons,* 14 N. Y. 2d 399. But the Superior Court of New Jersey in a well considered opinion has reached a contrary conclusion with respect to this book in *G. P. Putnam's Sons* v. *Calissi,* 86 N. J. Super. 82. We find the reasoning in that decision and the opinions of the dissenting judges in the *Larkin* case more persuasive.

It follows that the entry must be

Decree affirmed.

WHITTEMORE, J. (dissenting, with whom Spiegel, J., joins) This book cannot be ruled to be "utterly without redeeming social importance." *Roth* v. *United States,* 354 U. S. 476, 484. *Jacobellis* v. *Ohio,* 378 U. S. 184, 191.

In the view of one or another or all of the following viz., the chairman of the English department at Williams College, a professor of English at Harvard College, an associate professor of English literature at Boston University, an associate professor of English at Massachusetts Institute of Technology, and an assistant professor of English and American literature at Brandeis University, the book is a minor "work of art" having "literary merit" and "historical value" and containing a good deal of "deliberate, calculated comedy." It is a piece of "social history of interest to anyone who is interested in fiction as a way of understanding society in the past."[1] A saving grace is

[1] One of the witnesses testified in part as follows: "Cleland is part of what I should call this cultural battle that is going on in the 18th century, a battle between a restricted Puritan, moralistic ethic that attempts to suppress freedom of the spirit, freedom of the flesh, and this element is competing with a freer attitude towards life, a more generous attitude towards life, a more wholesome attitude towards life, and this very attitude that is manifested in Fielding's great novel 'Tom Jones' is also evident in Cleland's novel. . . . [Richardson's] 'Pamela' is the story of a young country girl; [his] 'Clarissa' is the story of

that although many scenes, if translated into the present day language of "the realistic, naturalistic novel, could be quite offensive" these scenes are not described in such language. The book contains no dirty words and its language "functions . . . to create a distance, even when the sexual experiences are portrayed." The response, therefore, is a literary response. The descriptions of depravity are not obscene because "they are subordinate to an interest which is primarily literary"; Fanny's reaction to the scenes of depravity was "anger," "disgust, horror [and], indignation." The book "belongs to the history of English literature rather than the history of smut."[2]

The book, according to its publisher, has been purchased by a considerable number of college libraries including the Harvard and Massachusetts Institute of Technology libraries.

It is not the court's function to consider whether to agree or disagree with the appraisal of the book by academic witnesses. The controlling circumstance is that the work is evaluated by representative scholars and teachers of English literature as a work of some literary and historical significance notwithstanding its patently pornographic aspects. I construe the concept embodied in the term "social importance" as used by the United States Supreme Court to

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a woman trapped in a house of prostitution. Obviously, then, Cleland takes both these themes, the country girl, her initiation into life and into experience, and the story of a woman in a house of prostitution, and what he simply does is to take the situation and reverse the moral standards. Richardson believed that chastity was the most important thing in the world; Cleland and Fielding obviously did not and thought there were more important significant moral values."

[2] In the opinion of the other academic witness, the headmaster of a private school, whose field is English literature, the book is without literary merit and is obscene, impure, hard core pornography, and is patently offensive.

include the literary and historical field. Hence, I believe that the publication of this book is protected by the First Amendment as expounded in the Supreme Court decisions. *Larkin* v. *G. P. Putnam's Sons,* 14 N. Y. 2d 399.

I assume that the book would be offensive to some, perhaps a great many, readers. So are numerous other books now published that use four letter words freely, portray sexual encounters explicitly and with a detail of description far beyond anything used by Cleland, and often appear intended to degrade and debase the sexual relationship. A purpose of some such books appears to be the destruction of concepts deemed basic to the existing social and moral order. If the measure intended by the *Roth* case, *supra,* were of possible effect on prevailing values, books like "Tropic of Cancer" would, I submit, be banned. But on such a scale "Fanny Hill" appears of slight, if any, weight and not worth the attention that efforts to ban inevitably bring. I agree with the opinion in the *Larkin* case, *supra,* that "[i]t is unlikely 'Fanny Hill' can have any adverse effect on the sophisticated values of our century." 14 N. Y. 2d 399, 403–404.

Freedom to read, as I construe it, means that such a book as this is to be available to those who wish to read it and that the persisting urge of others to bar its publication is effectively restrained. There is, of course, no obligation upon any member of the general public to read this book.

CUTTER, J. (dissenting) I disagree with the majority opinion for reasons in part somewhat different from those stated by Mr. Justice Whittemore and Mr. Justice Spiegel.

The book seems to me offensive and unpleasant in numerous respects. In my opinion, it could reasonably be found that distribution of the book to persons under the age of eighteen would be a violation of G.L. c. 272, § 28,[1] as tending

[1] Section 28 (as amended through St. 1959, c. 492, § 1), reads in part as follows: "Whoever sells or . . publishes for the

to corrupt the morals of youth. Despite the propensity of some young people to regard forbidden territory as a challenge to its exploration, it is not for the courts to determine whether it is wise to seek to prevent sale of such a book to persons under eighteen. I perceive no constitutional obstacle to treating as a criminal offence the sale of this book to persons under eighteen.[2]

It is quite another thing effectually to prohibit sale of the book to all adults in Massachusetts by declaring the book to be obscene. This proceeding presents much the same substantive question involved in *Butler* v. *Michigan*, 352 U. S. 380, 382–384. There the Supreme Court of the United States held that Michigan could not prevent the sale to adults of a book which might "have a potentially deleterious influence upon youth." Michigan then argued that it was promoting the public welfare "by thus quarantining the general reading public against books not too rugged for grown men and women in order to shield juvenile inno-

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purpose of selling or distributing, to a person under the age of eighteen years a book . . . which is obscene . . . or manifestly tends to corrupt the morals of youth . . . shall be punished by imprisonment in the state prison for not more than five years or in a jail or house of correction for not more than two and one half years, or by a fine of not . . . more than five thousand dollars, or by both such fine and imprisonment in jail or the house of correction. In order to obtain a conviction under this section, it shall not be necessary to prove that the book . . . has been adjudged to be obscene . . . under the provisions of" §§ 28C to 28H.

[2] This, as a practical matter, might cause some booksellers to refuse to sell the book to persons recognizable as minors and to be somewhat cautious about its distribution. See Lockhart and McClure, Censorship of Obscenity: The Developing Constitutional Standards, 45 Minn. L. Rev. 5, 84–87. Although no declaration was expressly sought that sale of the book might be a violation of § 28, a determination that the book may not be sold to certain minors is a lesser form of relief which may be reasonably regarded as included in the greater equitable relief asked for under § 28C.

cence." Mr. Justice Frankfurter wisely said of this argument, "Surely, this is to burn the house to roast the pig. . . . [The] legislation [is] not reasonably restricted to the evil with which it is said to deal. The incidence of this enactment is to reduce the adult population of Michigan to reading only what is fit for children. It thereby arbitrarily curtails one of those liberties of the individual, now enshrined in the Due Process Clause of the Fourteenth Amendment, that history has attested as the indispensable conditions for the maintenance and progress of a free society." Here the effort is so to apply the provisions of c. 272, §§ 28C–28H, as amended (see also §§ 28, 28A, and 28B), as to deprive adults of the opportunity to read written material which, in the opinion of some members of the academic community, has some historical, literary, sociological, or entertainment interest. Although the book seems to me pretty sorry material, there is no accounting for tastes. It is irrelevant that the taste of those who wish to read this tawdry writing seems deplorable to judges, or to prosecutors, or to persons of conventional habits, or to volunteer guardians of the morals of other adults. Although this book appears to me to have substantially less literary excuse than the book discussed in *Attorney Gen.* v. *"Tropic of Cancer,"* 345 Mass. 11, it cannot be said to be "utterly without redeeming social importance." As I read the recent United States decisions, they declare in effect (if not in words) that to justify literary censorship there must be absent any form of worth. See *Jacobellis* v. *Ohio,* 378 U. S. 184, 191–192.

I would (a) limit the relief granted to a declaration that distribution of this book to persons under the age of eighteen may be found to constitute a violation of c. 272, § 28, if that section is reasonably applied, and (b) expressly declare that, in view of the First Amendment, the book cannot be adjudged "obscene" in the sense in which that term

has been used in recent constitutional decisions of the Supreme Court of the United States.

Charles Rembar of New York (*Reuben Goodman* with him) for the intervener.

William I. Cowin, Assistant Attorney General (*John E. Sullivan,* Assistant Attorney General with him), for the Attorney General.

Henry P. Monaghan for the Civil Liberties Union of Massachusetts & others, amici curiae, submitted a brief.

Statutory Appendix.

General Laws, Chapter 272.

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Section 28B. Whoever imports, prints, publishes, sells, loans or distributes, or buys, procures, receives, or has in his possession for the purpose of sale, loan or distribution, a book, knowing it to be obscene, indecent or impure, or whoever, being a wholesale distributor, a jobber, or publisher sends or delivers to a retail storekeeper a book, pamphlet, magazine or other form of printed or written material, knowing it to be obscene, indecent or impure, which said storekeeper had not previously ordered in writing, specifying the title and quantity of such publication he desired, shall be punished by imprisonment in the state prison for not more than five years or in a jail or house of correction for not more than two and one half years, or by a fine of not less than one hundred dollars nor more than five thousand dollars, or by both such fine and imprisonment in jail or the house of correction. [As amended by St. 1960, c. 311.]

SECTION 28C. Whenever there is reasonable cause to believe that a book which is being imported, sold, loaned or distributed, or is in the possession of any person who intends to import, sell, loan or distribute the same, is obscene, indecent or impure, the attorney general, or any district attorney within his district, shall bring an information or petition in equity in the superior court directed against said book by name. Upon the filing of such information or petition in equity, a justice of the superior court shall, if, upon a summary examination of the book, he is of opinion that there is reasonable cause to believe that such book is obscene, indecent or impure, issue an order of notice, returnable in or within thirty days, directed against such book by name and addressed to all persons interested in the publication, sale, loan or distribution thereof, to show cause why said book should not be judicially determined to be obscene, indecent or impure. Notice of such order shall be given by publication once each week for two successive weeks in a daily newspaper published in the city of Boston and, if such information or petition be filed in any county other than Suffolk county, then by publication also in a daily newspaper published in such other county. A copy of such order of notice shall be sent by registered mail to the publisher of said book, to the person holding the copyrights, and to the author, in case the names of any such persons appear upon said book, fourteen days at least before the return day of such order of notice. After the issuance of an order of notice under the provisions of this section, the court shall, on motion of the attorney general or district attorney, make an interlocutory finding and adjudication that said book is obscene, indecent or impure, which finding and adjudication shall be of the same force and effect as the final finding and adjudication provided in section twenty-eight E or section twenty-eight F, but only until such final finding and adjudication is made or until

further order of the court. [As inserted by St. 1945, c. 278, § 1.]

SECTION 28D. Any person interested in the sale, loan or distribution of said book may appear and file an answer on or before the return day named in said notice or within such further time as the court may allow, and may claim a right to trial by jury on the issue whether said book is obscene, indecent or impure. [As inserted by St. 1945, c. 278, § 1.]

SECTION 28E. If no person appears and answers within the time allowed, the court may at once upon motion of the petitioner, or of its own motion, no reason to the contrary appearing, order a general default and if the court finds that the book is obscene, indecent or impure, may make an adjudication against the book that the same is obscene, indecent and impure. [As inserted by St. 1945, c. 278, § 1.]

SECTION 28F. If an appearance is entered and answer filed, the case shall be set down for speedy hearing, but a default and order shall first be entered against all persons who have not appeared and answered, in the manner provided in section twenty-eight E. Such hearing shall be conducted in accordance with the usual course of proceedings in equity including all rights of exception and appeal. At such hearing the court may receive the testimony of experts and may receive evidence as to the literary, cultural or educational character of said book and as to the manner and form of its publication, advertisement, and distribution. Upon such hearing, the court may make an adjudication in the manner provided in said section twenty-eight E. [As inserted by St. 1945, c. 278, § 1.]

SECTION 28G. An information or petition in equity under the provisions of section twenty-eight C shall not be open to objection on the ground that a mere judgment, order or decree is sought thereby and that no relief is or could be claimed thereunder on the issue of the defendant's knowl-

edge as to the obscenity, indecency or impurity of the book. [As inserted by St. 1945, c. 278, § 1.]

SECTION 28H. In any trial under section twenty-eight B on an indictment found or a complaint made for any offence committed after the filing of a proceeding under section twenty-eight C, the fact of such filing and the action of the court or jury thereon, if any, shall be admissible in evidence. If prior to the said offence a final decree had been entered against the book, the defendant, if the book be obscene, indecent or impure, shall be conclusively presumed to have known said book to be obscene, indecent or impure, or if said decree had been in favor of the book he shall be conclusively presumed not to have known said book to be obscene, indecent or impure, or if no final decree had been entered but a proceeding had been filed prior to said offence, the defendant shall be conclusively presumed to have had knowledge of the contents of said book. [As inserted by St. 1945, c. 278, § 1.]

GENERAL LAWS, CHAPTER 231A.

SECTION 1. The supreme judicial court, the superior court, the land court and the probate courts, within their respective jurisdictions, may on appropriate proceedings make binding declarations of right, duty, status and other legal relations sought thereby, either before or after a breach or violation thereof has occurred in any case in which an actual controversy has arisen and is specifically set forth in the pleadings and whether any consequential judgment or relief is or could be claimed at law or in equity or not; and such proceeding shall not be open to objection on the ground that a merely declaratory judgment or decree is sought thereby and such declaration, when made, shall have the force and effect of a final judgment or decree and be reviewable as such; provided, that nothing contained

herein shall be construed to authorize the change, extension or alteration of the law regulating the method of obtaining service on, or jurisdiction over, parties or affect their right to trial by jury. When a declaration of right, or the granting of further relief based thereon, shall involve the determination of issues of fact triable by a jury as of right and as to which a jury trial is duly claimed by the party entitled thereto, or issues which the court, in accordance with the practice of courts of equity, considers should be tried by a jury, such issues may be submitted to a jury in the form of questions, with proper instructions by the court, whether a general verdict be required or not. [As inserted by St. 1945, c. 582, § 1.]

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SECTION 6. In an action at law or suit in equity heretofore or hereafter brought to obtain a judgment or other consequential relief, whether such judgment or relief is granted or not, the court may make a binding determination as provided in this chapter upon application of any party made in his declaration, bill, petition or answer. [As inserted by St. 1945, c. 582, § 1.]